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No. ~~11,265~~

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JOHN O'SULLIVAN,

Appellant,

VS.

FRANK R. CREEDON, Office of Housing
Expediter,

Appellee.

Upon Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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JURISDICTION.

This is an appeal from the judgment of the District Court for the Northern District of California in favor of the appellee and against appellant, in which judgment it was ordered that the defendant pay to one Ruth Kalen the sum of \$150.00, and that the plaintiff have judgment against the defendant, on behalf of the United States of America in the sum of \$300.00. Jurisdiction of the District Court and this Court is granted by Section 205 (e) of the Emergency Price Control Act as amended (50 U.S.C. 925e).

STATEMENT OF FACTS.

On August 6, 1946, Paul A. Porter, Administrator of the Office of Price Administration, filed a complaint in the District Court for the Northern District of California, Southern Division, against the defendant, John O'Sullivan, alleging that since July 1, 1942, the defendant demanded and received rents higher than the maximum rents permitted by the Rent Regulations, and demanded a preliminary and final injunction against the defendant and judgment in favor of the Administrator for three times the amount of each overcharge, or \$50.00, whichever was the greater, to each tenant so overcharged.

The cause was heard on March 3, 1947. The evidence adduced established that on July 8, 1945, the Rent Director for the San Francisco Bay Defense Rental Area issued an order proposing to decrease the maximum rent for the premises involved from \$75.00 per month to \$62.50 per month retroactive beginning with the first rental period after September 30, 1943. (Rep. Tr. p. 36.)

Thereafter on October 31, 1945, an order decreasing maximum rent retroactive beginning with the first rental period after September 30, 1943, was issued. The order further provided that any rent received by the landlord in excess of the maximum rent fixed by the order for a rental period commencing on or after October 1, 1943, must be refunded to the tenant within thirty days from the date of the order. (Rep. Tr. p. 44.) No refund was ever made under this order. (Rep. Tr. p. 50.)

SPECIFICATION OF ERRORS.

1. The Court erred in granting judgment for the plaintiff.

2. The Court erred in denying defendant's motion to dismiss.

3. The Court erred in holding that the claim of the Administrator was not barred by the provisions of Section 205 (e) of the Emergency Price Control Act as amended (50 U.S.C. 925e), which provides that action to recover overcharges must be instituted within one year of the time of the overcharge.

ARGUMENT.

Section 205 (e) of the Emergency Price Control Act as amended (50 U.S.C. 925e) provides in part as follows:

“If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period.”

In this case the Administrator's complaint was filed on August 6, 1946. The overcharges complained of were paid from February 20, 1944, to March, 1945 (Findings of Fact, Transcript of Record, page 18, Finding IV). Thus it is apparent that the Admin-

istrator's action was commenced more than one year after the alleged overcharges.

Creedon v. Stone, 163 Fed. (2d) 393 (C.C.A. 6), is an exactly similar case involving a retroactive reduction of rent in which the defendant failed to make refund. The Court held that the Administrator's action was barred by the one-year statute of limitations of Section 205 (e), stating in part as follows:

“The principal legal question presented is whether the one-year statute of limitations provided by the Act commences to run from the time of overcharge, as held by the District Court or from the time of the failure to refund, as contended by the Administrator.

We think the judgment of the District Court is clearly correct. Section 205 (e) is ‘the sole means whereby individuals may assert their private right to damages and whereby the Administrator on behalf of the United States may seek damages in the nature of penalties.’ *Porter v. Warner Holding Co.*, 328 U.S. 395, 401, 402.

Read in the ordinary sense, as applied to the payment of rent, Sec. 205 (e) plainly provides that each separate overcharge is the violation referred to. Each separate overcharge is certainly a violation of the regulation or order ‘prescribing a maximum price,’ and each separate overcharge gives rise to a cause of action for the violation. *Gilbert v. Thierry*, 58 Fed. Supp. 235 (D. C. Mass.), affirmed, *Thierry v. Gilbert*, 147 Fed. (2d) 603, 604 (C.C.A. 1). There is no merit in the contention that the violation upon which this cause of action is based is the failure or refusal to make the refund. Such a failure or refusal

is a violation of Section 4 (e) of the Rent Regulation for Housing, and if a refund order is issued by the Administrator, it is a violation of the order; but such failure or refusal is not the violation specified in Sec. 205 (e), which is the violation of the 'maximum price regulation' or order. To causes of action based on these overcharges, since they are violations under Sec. 205 (e), the one-year statute of limitations applies."

It is respectfully submitted that the above cited case is decisive of the present action, and that the judgment of the trial Court must be reversed.

Dated, San Francisco, California,
November 3, 1947.

Respectfully submitted,

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